



## MONTGOMERY COUNTY ETHICS COMMISSION

### Advisory Opinion 23-10-015

October 13, 2023

You have requested an advisory opinion from the Ethics Commission with respect to issues arising from the proximity of your role with that of your spouse, who is the selectee pursuant to a merit system appointment to a position with greater proximity to you in the chain of command than has previously been the case. If your spouse begins in the position, the person who your spouse would report to reports directly to you. The Commission's understanding is that your spouse has accepted an offer conditioned on the provision of advice to you from the Ethics Commission.<sup>1</sup>

The Montgomery County Public Ethics Law provides that “the people have a right to public officials and employees who are impartial and use independent judgment.” The ethics law seeks to accomplish this through various approaches, including requiring the filing of public financial disclosures by certain employees and through a series of prohibitions. The prohibitions of the ethics law do not extend to every action an employee might take in the performance of their County role that gives rise to an appearance of a conflict of interest. And the paths available to address circumstances that may create an appearance of a conflict of interest are not limited to the application of a prohibition in the ethics law. For example, management, particularly in dealing with employees not subject to the County's merit law, can address appearance of conflicts through definition of roles and responsibilities and assuring that employees are not placed in circumstances where their ability to be impartial and use independent judgment may be questioned.

### Your Spouse's Economic Interests

The County's ethics law prohibits employees from taking any action that affects a relative's economic interest in property. The Montgomery County Public Ethics Law defines economic interest to include sources of income, such as a person's salaried employment. (*See* Mont. Co. Code Sec. 19A-4(j)). The ethics law provides:

#### **Sec. 19A-11. Participation of public employees.**

- a. *Prohibitions.* Unless permitted by a waiver, a public employee must not participate in:

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<sup>1</sup> This opinion follows AO 23-09-13 and can be read in concert with that opinion.

1. any matter that affects, in a manner distinct from its effect on the public generally, any:

....

(C) property or business in which a relative has an economic interest, if the public employee knows about the relative's interest . . . .

The clear import of this prohibition is that you are prohibited by the ethics law from participating in matters that affect your spouse's economic interest. This would include matters that specifically pertain to your spouse's salary, any complaint or grievance matter that concerns or is alleged to concern any action taken by your spouse, or any other personnel matter that specifically relates to your spouse's salary. Matters that generically apply to all County employees or large subsets of employees, such as all MLS employees would not implicate the prohibition of 19A-11(a)(1)(C). As the size of the group whose economic interests are affected by a matter narrows, the likelihood of a conflict of interest increases if the group includes your spouse.

### **Matters Without Direct Impact on Your Spouse's Economic Interests That May Create Appearance Issues**

When you assumed your current role in September of 2020, you had recused yourself from matters involving your spouse's economic interests including any matter concerning salaries for MLS employees at your spouse's agency to your deputy. You propose the continuation of that recusal and delegation to your deputy. Your spouse at the time was a Management Leadership Service employee at the agency. At the time you assumed your current role, counsel for the Commission provided advice to you that stated: "with respect to any planned recusal, the Commission recommends that [the person who directs your activities] be the person assigned to make decisions and address any issues that you are recused from. Having a subordinate execute responsibilities that create a conflict of interest for a superior should be avoided where possible."

The Ethics Commission reaffirms that where possible, any assumption of responsibilities from a recusal of the nature contemplated should move up the chain of command, not down. In this way, any pressure felt by a subordinate to make a decision that affects the superior's financial interests (through the superior's spouse's economic interests) is minimized.

The advice to seek a person up the chain of the command to address matters from which you are recused results from your responsibility to act as the manager of those who report to you. If you were to intentionally put pressure on such an employee to view your spouse favorably in matters relating to your spouse, that would quite obviously be a misuse of office for private gain pursuant to 19A-14 of the County Code. In theory, without the presence of overt misuse of the prestige of office, a recusal down the chain of command would not result in a violation of the prohibition against working on matters affecting a relative's financial interest. However, it nonetheless would create an appearance issue for you to be rating and managing the persons who

are directly responsible for the personnel matters and actions pertaining to your spouse. This “appearance issue” is not specifically prohibited by the ethics law. But just because something is not prohibited does not mean that it is a good idea to engage in that conduct. While there are limits to what an ethics law can reasonably prohibit or how well a recusal system can create immunity from appearance issues, the objective of the Montgomery County Public Ethics Law is to provide the people with public officials and employees who are impartial and use independent judgment.

There are other matters that you might be asked or expected to work on that present an appearance issue that do not implicate an express prohibition of the ethics law. Your email requesting an opinion indicates that general oversight responsibilities of the agency’s programs and policies would be executed by two of your subordinates. You state that your role involving the agency where your spouse would be working would concern issues that “span multiple departments or are of significant community impact, such as our Covid-19 response.” This is offered as another guardrail to limit conflicts of interest. This proffer suggests that given the breadth of your responsibilities, there would be limited instances where you would be actively involved in matters involving your spouse’s agency except with respect to the most serious issues to County. Given your spouse’s senior role at the agency, it would certainly be foreseeable that your job responsibilities would bring you into direct contact with your spouse on matters of great import to the County. Here again, there is no ethics restriction that prohibits this type of activity. Whether it presents an appearance issue to be avoided is a decision to be made by your superior.

It is important that all relevant people up and down your chain of command are aware of the limitations on your employment and that these limitations be documented with them. Further, with respect to your supervisor, it is important that this opinion be shared with that person so that that person is engaged in determining how the County can avoid the appearances of conflicts of interest that could accrue from the circumstances as well as being engaged in the best way to implement the recusals to which you have committed.

For the Commission:



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Jennifer Collins, Acting Chair